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No. 04-698

In The
Supreme Court of the United States

BRIAN SCHAFFER, a minor,
by his parents and next friends,
JOCELYN AND MARTIN SCHAFFER, *et al.*,

Petitioners,

v.

JERRY WEAST, Superintendent of
Montgomery County Public Schools, *et al.*,

Respondents.

On Writ Of Certiorari To The Fourth Circuit Court Of Appeals

BRIEF OF PETITIONERS

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QUESTION PRESENTED

Under the Individuals with Disabilities Education Act, when parents of a disabled child and a local school district reach an impasse over the child's individualized education program, either side has a right to bring the dispute to an administrative hearing officer for resolution. At the hearing, which side has the burden of proof – the parents or the school district?

LIST OF PARTIES

The petitioners are Jocelyn Schaffer and Martin Schaffer, appearing in their own right and as parents and next friends of their son, Brian Schaffer.

The respondents are Jerry Weast, Superintendent of the Montgomery County Public Schools, and the Board of Education of Montgomery County, Maryland.

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BRIEF OF PETITIONERS

The petitioners – parents of a child with disabilities – respectfully petition the Court to reverse the judgment of the court of appeals and rule that, under the Individuals with Disabilities Education Act, the school district – rather than parents – must bear the burden of proof at an administrative hearing held to assess the appropriateness of an individualized education program.

OPINIONS BELOW

There are six opinions below, culminating in the court of appeals ruling that is the subject of the writ of certiorari. In chronological order, they are as follows:

- In 1998, the administrative law judge ("ALJ") imposed the burden of proof on the parents and ruled for the school district on the merits of the child's individualized education program ("IEP"). This unpublished decision is reprinted in the appendix to the petition for writ of certiorari at Pet. App. 120.

- In 2000, the district court reversed the ALJ on the burden of proof issue, placed the burden on the school district, and remanded the case for further proceedings. This decision is published as *Brian S. v. Vance*, 86 F. Supp. 2d 538 (D. Md. 2000). It is reprinted at Pet. App. 54.

- In 2000, with the burden of proof placed on the school district, the ALJ ruled for the parents on the merits, holding that the IEP proposed by the school district was inappropriate and that the program favored by the parents was appropriate. This unpublished decision is reprinted at Pet. App. 70.

- In 2001, without deciding the burden of proof issue, the court of appeals vacated the district court's 2000 decision and remanded the case for further proceedings, including an appeal from the ALJ's second decision on the

merits. The opinion is found at *Schaffer v. Vance*, 2 Fed. Appx. 232 (4th Cir. 2001) (*per curiam*). It is reprinted at Pet. App. 50.

- In 2002, the district court again placed the burden of proof on the school district, and it affirmed the ALJ's 2000 ruling for the parents on the merits. This opinion is published as *Weast v. Schaffer*, 240 F. Supp. 2d 396 (D. Md. 2002). It is reprinted at Pet. App. 21.

- Finally, in 2004, a divided court of appeals reversed the district court on the burden of proof issue, imposed the burden on the parents and remanded the case. This decision – the subject of the writ – is published as *Weast v. Schaffer*, 377 F.3d 449 (4th Cir. 2004). It is reprinted at Pet. App. 1. The dissent of Judge Luttig is reprinted at Pet. App. 16.

An unpublished denial of rehearing *en banc* is reprinted at Pet. App. 164. An order of the district court – following remand – to stay proceedings there pending this Court's disposition of the case is reprinted at Pet. App. 163.

JURISDICTION

The panel decision of the court of appeals was entered on July 29, 2004. The decision of the court of appeals denying the petition for rehearing *en banc* was entered on August 24, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254. A writ of certiorari was issued on February 22, 2005.

STATUTORY PROVISIONS INVOLVED

This case arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* Reprinted in the appendix to the petition is § 1400, which contains congressional findings as well as the purpose of

the IDEA. Pet. App. 166. Also reprinted is § 1415, which contains procedural safeguards, including the § 1415(f) requirement for an "impartial due process hearing." Pet. App. 174.

After the petition was filed, Congress enacted a reauthorization of the IDEA. *See* Individuals With Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446. Modified slightly by this legislation, the amended versions of § 1400 and § 1415 are reproduced in the Addendum to this brief. In both its previous form and its amended version, the IDEA is silent on the burden of proof.

STATEMENT OF THE CASE

Brian Schaffer, the petitioners' child, was 14 years old when this case began. Pet. App. 75, 124. Now twenty, he eventually attended – and ultimately graduated from – the public schools of Montgomery County, Maryland. Yet, he entered the public schools only *after* the Montgomery County Public Schools ("MCPS") finally offered him a placement in a Learning Center designed to provide specialized instruction to students with learning disabilities. This placement was consistent with the accommodation sought by Brian's parents, experts and teachers from the beginning. If the school district had only offered such a program to Brian when his parents first sought a placement, this case would not be here. *See* Joint Appendix ("J. App.") 14-16, 25.

Given the initial failure of MCPS to provide Brian an appropriate education program, his public school attendance was delayed by several years. During those years, Brian's parents, Jocelyn and Martin Schaffer, were forced to pay for a private school placement where he could obtain the necessary accommodation that the school district refused him. *See* J. App. 14-15. But, in a larger sense, this case is not just about the travails of Brian and his parents. It is about

the single mother struggling to get help for her Down's Syndrome son. It is about the couple from the inner city whose attempts to obtain services for their wheelchair-bound daughter have been repeatedly stymied. It is about the brilliant but autistic child whose future as a productive citizen depends on the therapy services that his school district has unilaterally decided to slash.

Indeed, this case is about the 6.7 million children who receive services under the IDEA. For many of these children, the ability to obtain meaningful access to the education that the law guarantees them depends on the resolution of this basic question: Under the IDEA, who has the burden of proof at an administrative hearing – the parents or the school district?

A History of Discrimination

In the early 1970's, discrimination against children with disabilities was rampant. Indeed, "a majority of handicapped children in the United States 'were either *totally excluded* from schools or [were] *sitting idly* in regular classrooms awaiting the time when they were old enough to "drop out."'" *Board of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) (emphasis added) (quoting H.R. Rep. No. 94-332, p. 2 (1975)). The children who suffered such treatment numbered in the millions. *Id.* at 189 (citing 89 Stat. 774, note following § 1401).[1]

Faced with such an intolerable situation, parents and civil rights groups began turning to the federal courts, where they sought relief on constitutional claims. Among these cases were two landmark decisions: *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), and *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 334

[1] *See* Brief for the Arc of the United States, *et al.* at 18-20 (discussing history of discrimination against disabled children).

F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (1972) ("*PARC*"). Ordering an end to discrimination and exclusion, each case crafted a remedy requiring local school authorities to provide educational services to children with disabilities, and each gave parents the right to a hearing governed by principles of due process. These two cases contributed most prominently to action by Congress in 1975, when it enacted the Education for All Handicapped Children Act. *See Rowley*, 458 U.S. at 180 n.2. As the predecessor to the IDEA,[2] this federal law contained a requirement for an "impartial due process hearing" – the same administrative hearing where the burden of proof is at issue here.

The IDEA

Under the IDEA, Congress provides money to the States to "ensure that all children with disabilities have available to them a free appropriate public education ['FAPE'] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U.S.C. § 1400(d)(1)(A).[3] Those funds are then reallocated to local school districts for use in defraying costs of their special education programs. Along with the federal funds comes an obligation for the school district to abide

[2] Now known as the IDEA, the law has been known by other names since it was first adopted in 1975, including the Education for All Handicapped Children Act (EAHCA) and the Education of the Handicapped Act (EHA). For the sake of consistency, this brief generally refers to the federal law as "the IDEA," even when the statute or case used one of the law's former names. This approach mirrors the one followed implicitly by the decision below and followed by other circuits as well. *See, e.g., Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 915 n.2 (6th Cir. 2000) (explicitly adopting this approach to statutory nomenclature).

[3] The 2004 amendment added the words "further education."

by certain standards in developing individualized education programs ("IEPs") for children with disabilities.[4]

A large number – and broad range – of students with disabilities are served by the IDEA, including many whose disabilities are quite severe. According to the U.S. Department of Education, more than 6.7 million students – aged 3 through 21 – were served by the IDEA, during the 2003-04 school year. Their disabilities and the number in each category are as follows:

Disability[5]	Number
Specific Learning Disabilities	2,881,068
Speech or Language Impairments	1,460,583
Mental Retardation	605,026
Emotional Disturbance	490,292
Multiple Disabilities	141,102
Hearing Impairments	79,522
Orthopedic Impairments	77,274
Other Health Impairments	467,259
Visual Impairments	29,140
Autism	163,773
Deaf-Blindness	1,921
Traumatic Brain Injury	23,481
Developmental Delay	305,752
All Disabilities	6,726,193

See U.S. Department of Education, Office of Special Education Programs, Data Analysis System, *available at*

[4] The IEP is a written document developed by an IEP team that includes, *inter alia*, the child's parents, his teacher and local school division representatives. 20 U.S.C. § 1414(d). The IEP contains a statement of how the child's disability affects the child's involvement and progress in the general curriculum, a description of specific educational services to be provided to the child, annual goals, and objective criteria for evaluating progress. *Id.*

[5] Definitions and examples of these disabilities are found at 34 C.F.R. § 300.7(c)(10). *See* Add. 39.

<www.ideadata.org/tables27th/ar_aa7.htm> and <www.ideadata.org/tables27th/ar_aa9.htm> (visited Apr. 16, 2005).

The IDEA precludes school officials from making unilateral decisions about a child's IEP. Instead, such decisions must be made by school officials and parents in collaboration. As the U.S. Department of Education has explained, "parents and school personnel" are "equal participants" and "equal partners" in making decisions about the content of a child's IEP. 34 C.F.R. Part 300, Appendix A, "Interpretation of IEP and Other Selected Requirements under Part B of the [IDEA]," Question 9 ("USDOE Question 9"). If the parents and the school district reach an impasse over the contents of an IEP, either side may initiate an administrative proceeding – an "impartial due process hearing" – to bring the issue before a neutral hearing officer (or administrative law judge) for resolution.[6] As a practical matter, it is almost always the parents who initiate the hearing because the school district usually can have its way simply by withholding the services in dispute.

Finally, the law provides that any party aggrieved by the results of the administrative hearing may appeal to a state court of competent jurisdiction or to a federal district court.[7]

[6] 34 C.F.R. § 300.507(a)(1); 20 U.S.C. § 1415(f)(1)(A) (2004 amendment).

[7] *See* 20 U.S.C. § 1415(i)(2)(A). States may elect to use an administrative review as an intermediate step between the due process hearing and judicial review. 34 C.F.R. § 361.57(g). However, Maryland has not implemented this option.

The Petitioners' Child

There is "no question" that Brian Schaffer has multiple disabilities. Pet. App. 56. He is "learning disabled, language-impaired and other health impaired." Pet. App. 24. From pre-kindergarten through the seventh grade, Brian attended an independent school, Green Acres School. The tuition was paid by his parents and is not the subject of this dispute. At Green Acres School, Brian had the benefit of small class size and significant accommodations, as well as extra services provided by his parents. Despite these services, he did poorly. Pet. App. 24. In the fall of 1997, when Brian was in the seventh grade, Green Acres School concluded that he should attend a school that could more adequately accommodate his disabilities. Pet. App. 77. Brian's parents then turned to MCPS and began to seek an appropriate placement for the following school year. Pet. App. 24.

The school district agreed that, under the IDEA, it was obligated to provide Brian with special education and related services. Even so, MCPS rejected the conclusions of the outside experts who had evaluated Brian. It also rejected the recommendations of the Green Acres teachers who had worked with him. Instead, the school district accepted the rosier views of its own employees. Thus, there was disagreement about the nature of Brian's disabilities and, as a result, there also was disagreement about the services he required.

According to outside experts, Brian suffered from a "unique central auditory processing deficit." Pet. App. 108. As one such expert explained:

> [Brian's] auditory processing of words was so impaired . . . that his ability to execute any auditory tasks should be considered possibly compromised by this one feature.

* * *

> [Brian's] serious needs in reading, writing, spelling and probably math indicate that he should be placed in a self-contained, full-day special education program.

Pet. App. 78, 126 (decision of hearing officer) (quoting report of Carol A. Kamara, Ph.D., CCC-SLP/A, an independent speech language pathologist/audiologist). In short, Brian needed "small, self-contained special education classes" that would "minimize the distractions interfering with his ability to learn." Pet. App. at 25.[8] This finding was consistent with the placement at the Learning Center that the school district belatedly offered Brian several years later. *See infra* at 13.

By contrast, the MCPS employees did not believe that Brian had a central auditory processing problem.[9] In their view, he only had a "mild speech-language disability" and, thus, did not need the more intensive accommodations recommended by the outside experts. Pet. App. 26. As a result, the IEP proposed by the school district called for Brian to be taught most of his academic subjects in a large classroom with 24-28 other students. For some subjects, the school district simply planned to place Brian in a regular classroom. Pet. App. 90. For other subjects, his classroom would use an "inclusion model" with two teachers, one of whom would work with five to six special education students in the midst of the other students and larger setting. Pet. App. 87. The larger class size and "inclusion model" formed the centerpiece of the IEP offered by the school district. *See* Pet. App. 87-91.

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[8] A discussion of the outside experts by the ALJ appears at Pet. App. 78-80, 91, 103-09.

[9] A discussion of the school district's experts by the ALJ appears at Pet. App. 83-84, 103-09.

In light of Brian's severe learning deficits and the advice of those experts most familiar with him, his parents advised MCPS that its proposed IEP was "insufficient to meet his identified needs." Rejecting the proposed IEP in May of 1998, Brian's parents requested an administrative due process hearing. Pet. App. 25. Anticipating a protracted dispute, they also enrolled Brian for the 1998-99 school year at the McLean School, where they had previously reserved a space. McLean is a private school in Montgomery County that accommodates learning and language-disabled students in small classes. Pet. App. 25.

Because MCPS did not offer Brian an appropriate education in the public schools, his parents sought reimbursement for the tuition and expenses they paid to the McLean School.[10] Pet. App. 22. *See School Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369 (1985) (holding that IDEA authorizes a court "to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act."). Brian's parents also pursued their claim in order to obtain a favorable decision that would enable their child to receive an appropriate education from the school district in the coming years.

[10] Although Brian graduated from high school in 2003, this case nonetheless presents a continuing controversy because petitioners seek reimbursement for the costs they incurred in providing their son the appropriate education services that the school district refused to provide. These costs total thousands of dollars for eighth grade alone. *See Zobrest v. Catalina Foothills Sch. District*, 509 U.S. 1, 4 n.3 (1993) (holding that claim for reimbursement preserves case as live controversy despite student's graduation).

The ALJ's First Decision

The administrative hearing lasted three days. As directed by the ALJ, each side filed briefs on the burden of proof. Pet. App. 57. Each side argued that the burden should be borne by the other. Each side also presented expert testimony supporting its position on the merits. The outside experts, Brian's parents, and educators from Green Acres School explained that the school district's plan was deficient. The MCPS witnesses disagreed. After weighing the conflicting evidence, the ALJ concluded that it was evenly balanced and that the outcome of the case depended on which side had the burden of proof. Pet. App. 144.

The ALJ recognized that "[t]here is no clear authority" on who bears the burden of proof and that "[t]he case law provides support for assigning that burden to either party." Pet. App. 144. Confronted by the conflicting authorities, the ALJ elected the minority position, concluding that "the *Parents* bear the burden of persuasion." Pet. App. 146 (emphasis added). Thus, the petitioners were required to show that the IEP prepared by MCPS did not offer Brian an appropriate education. Having thus imposed the burden of proof on Brian's parents – and viewing the burden as "critical" to the outcome – the ALJ concluded that the parents had failed to meet their burden. Pet. App. 156. Thus, he ruled for the school district on the merits of the case, approving the school district's plan for Brian.

The District Court – First Decision

Brian's parents appealed the ALJ's decision to the United States District Court for the District of Maryland.[11] There they prevailed. Reversing the ALJ on the burden of proof issue, the district court placed the burden on the school district and remanded the case back to the ALJ for further proceedings under the corrected standard. In so ruling, the district court relied heavily on an IDEA case decided by the New Jersey Supreme Court, *Lascari v. Board of Education,* 560 A.2d 1180, 1188 (N.J. 1989).[12]

Lascari is a seminal case explaining why the school district should *always* bear the burden of proof. Even so, on the facts before it, the district court found that it did not need to go so far as *Lascari*. Adhering to a middle course, the district court distinguished between two types of cases – those involving an *initial* IEP and those involving a proposed change to an *existing* IEP. With regard to an initial IEP, the district court ruled that *the school district* should have the burden of proof at the administrative hearing. However, "where a party – either the parents or the school district – seeks to change an existing IEP, the burden at the due process hearing fairly lies with the party seeking the change." Pet. App. 55. This distinction was later obliterated by the sweeping language of the Fourth Circuit, which places the burden on the parents in *all* cases when they challenge a proposed IEP. *See infra* at 16-18.

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[11] *See* 20 U.S.C. § 1415(i)(2)(A) ("Any party aggrieved by the findings and decision . . . [of an ALJ], shall have the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy."). It is this statute that provided the basis of jurisdiction for the original action in district court.

[12] All but ignored by the two judges forming the Fourth Circuit majority, *Lascari* figures prominently in the split among lower courts. *See* Pet. at 25.

The School District's Change of Mind

The district court's decision placing the burden of proof on school authorities was rendered in March 2000. It was soon followed by the school district's belated disclosure to Brian's parents that it operated a Learning Center at one of its venues, Walter Johnson High School. The Learning Center is a program designed to educate students with learning disabilities by utilizing small classes taught by special educators. MCPS offered this program to Brian in August 2000, and it was enthusiastically embraced by his parents.[13] In short, when the school district was told by a federal court that it must bear the burden of proof, it finally offered Brian what it previously refused: an appropriate education. Meanwhile, the litigation over its earlier, inadequate IEP proposal continued.

The ALJ's Second Decision

When the remanded case came back to the ALJ, no new evidence was presented. Thus, the "weight of the evidence" again "rest[ed] in equipoise." Pet. App. 105, 109. With the burden now shifted to the school district, the ALJ ruled for the parents, concluding that the IEP failed to provide Brian with meaningful educational benefit. Pet. App. 110. As the ALJ explained, "[Brian's] learning disability, his distractibility, and his auditory processing skills deficit dictate that he be in small classes for all his academic subjects; large classes are not appropriate for the

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[13] This program was offered at an IEP meeting on August 15, 2000, a meeting that had been twice postponed because key representatives of the school district's team were not present when previous meetings were convened. Given the late date of the offer, the Schaffers' private school contract for the 2000-01 academic year had become binding, and they were responsible for the full year's tuition. Thus, Brian was enrolled in the Learning Center for the following academic year, 2001-02.

Child." Pet. App. 91.[14] Thus, the ALJ concluded that the IEP proposed by MCPS was "not appropriate" and "failed to afford [Brian] an opportunity for a FAPE . . . as required by IDEA." Pet. App. 115. At the same time, the ALJ ruled that Brian's private school placement "offers a setting and program appropriate to [Brian's] needs," Pet. App. 111, and he awarded Brian's parents *half* of the tuition they expended to obtain that placement for the 1998-99 school year. Pet. App. 115. Neither side found this decision satisfactory, and both appealed to the district court.[15] Meanwhile, other proceedings were underway in the court of appeals.

The Court of Appeals – First Decision

While the case was before the ALJ on remand, MCPS was simultaneously appealing the district court's 2000 decision to the Fourth Circuit. Although not critical to the outcome, this stage of the litigation is significant because of the involvement of the United States in support of the parents. The U. S. Department of Education, joined by the U. S. Department of Justice, Civil Rights Division, filed an *amicus* brief explaining why the burden should be placed on the school district.[16] To do otherwise, the United States said, would "unhinge [the] statutory framework" created by Congress. Brief for *Amicus Curiae* United States ("U.S. 2000 *Amicus* Brief") at 5, *Schaffer v. Vance*, 2 Fed. Appx.

[14] The ALJ also determined that the "inclusion model" proposed by the school district actually would be counter-productive, and that the school district's proposal fell short in other ways. For example, "[t]he IEP had no goals to address [Brian's] severe auditory deficit (perception of sound), which is responsible for his reading problem, and no goals to address his articulation problem." Pet. App. 91-92.

[15] As in the first appeal to the district court, the basis for jurisdiction was 20 U.S.C. § 1415(i)(2)(A). *See* n.11, *supra*.

[16] The United States has not participated in later stages of the case.

232 (4th Cir. 2001) (No. 00-1471), *available at* <www.usdoj.gov/crt/briefs/Schaffer.htm> (visited April 27, 2005). The government gave two overarching reasons for placing the burden of proof on the school district: (i) such an approach furthers the IDEA's goal of providing a free appropriate public education to children with disabilities, U.S. 2000 *Amicus* Brief at 6, and (ii) principles of fairness support allocating the burden to the party with greater access to necessary evidence. *Id.* at 13-14.

By the time the court of appeals heard oral argument, the ALJ had already ruled in favor of the parents. Thus, the court of appeals chose not to address the burden of proof until after the district court could hear an appeal from that second ALJ ruling. Instead, the court vacated the district court's decision and remanded the case "with directions that any issue with respect to the proof scheme in this case be consolidated with the consideration on the merits." Pet. App. 52.

The District Court – Second Decision

The case then came back before the district court, with the remand from the court of appeals linking up with cross-appeals from the ALJ's second decision. On cross-motions for summary judgment,[17] the district court again ruled that the school district had the burden of proof. Pet. App.

[17] When an IDEA case is heard on appeal by a district court, the parties typically use cross-motions for summary judgment as the procedural mechanism to bring forward their competing claims for judgment based on the administrative record. This is so even when that record contains conflicting evidence. *See, e.g., Beth B. v. Van Clay*, 282 F.3d 493, 496 n.2 (7th Cir. 2002) ("Due to the unique procedural posture of these cases . . . summary judgment has been deemed appropriate even when facts are in dispute. . . ."); *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 974 (10th Cir. 2004) (same); *Loren F. v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1313 (11th Cir. 2003) (same). Use of this procedure is not an issue in this case.

32. Concluding that MCPS "did not provide Brian with FAPE for 1998-99," the court awarded the parents full reimbursement for the tuition they paid in the 1998-99 school year. Pet. App. 41, 47. The school district then appealed to the Fourth Circuit, challenging the allocation of the burden of proof.

The Court of Appeals – the Decision at Issue

On appeal, the Fourth Circuit noted that the circuits are deeply split on how to allocate the burden of proof in administrative hearings under the IDEA. According to the panel majority, "[t]hree circuits assign the burden to the parents, and four (perhaps five) assign it to the school system." Pet. App. 7. The court actually understated the split.[18] Siding with the minority view, the divided panel reversed the district court and held that "parents who challenge an IEP have the burden of proof in the administrative hearing." Pet. App. 16.

In reaching this result, the panel majority began by recognizing a general principle governing the allocation of burdens of proof. It said: "Although 'the natural *tendency* is to place the burden[] on the party desiring change' or seeking relief *other factors* such as policy considerations, convenience, and fairness may allow for a different allocation of the burden of proof." Pet. App. at 6 (emphasis added) (quoting J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999)). Despite the precedents and "other factors" urged by Brian's parents, the majority "[saw] no reason to depart from the general rule that a party initiating a proceeding bears [the] burden [of proof]." Pet. App. 15.

[18] Two other circuits not mentioned by the Fourth Circuit have in *dicta* placed the burden on the school district. Thus, after the decision below, the split is seven-to-four, with the majority placing the burden on the school district. *See infra* at 18.

Relying on this "default" principle, it ruled for MCPS and remanded the case back to the district court.

Judge Luttig dissented. Starting with the same general principle as the panel majority, he reached the diametrically opposite result. In his view, "[e]ach of these 'other factors' – policy, convenience and fairness – weigh against the assignment of the burden of proof to the parents. . . ." Pet. App. 17. Aligning himself with the majority of circuits, he concluded that "the school district – and not the comparatively uninformed parents of the disabled child – must bear the burden of proving that the disabled child has been provided with the statutorily required appropriate educational resources." Pet. App. 16.

Following the panel decision, the court of appeals denied a petition for rehearing *en banc*. Pet. App. 164. Upon remand, the district court stayed further proceedings pending disposition of the case by this Court. Pet. App. 163.

In an epilogue to the decision below, the Fourth Circuit later ruled on the burden on proof in another IDEA case, *JH v. Henrico County School Board*, 395 F.3d 185 (4th Cir. 2005). While the case at bar involved an *initial* IEP, *JH* involved a school district's unilateral change to an *existing* IEP, where it dramatically cut – by 90 percent – the level of therapy provided to a child with autism.[19] Reversing the hearing officer, who had placed the burden on the school district, the Fourth Circuit said that, under

[19] At issue was the child's speech/language and occupational therapy, a form of services frequently necessary for children with autism. Instead of the previously-established two hours *per week* for each therapy, the school district was willing to provide "only two hours of speech/language therapy and two and a half hours of occupational therapy *for the entire summer.*" *JH*, Supplemental Joint Appendix at 87 (decision of hearing officer) (emphasis added).

its decision in *Weast*, the parents must bear the burden of proof even though the school district had unilaterally initiated a change to the IEP by cutting services. This is so, the Court simply said, because it is the parents who initiated the challenge. *Id.*, 395 F.3d at 195. The Fourth Circuit's decision in *JH* further illustrates the unfairness of the rule it has adopted.

The Split in the Circuits and the State Rules

This case presents a question of federal law for resolution by this Court. Even so, it may be helpful to note that *eleven* circuits have now addressed the same question – some by holdings, others by *dicta*. Four circuits – including the Fourth Circuit – have said that the burden of proof rests on the child's parents.[20] Seven circuits have said that the burden rests on the school district.[21] Additionally, in

[20] In addition to the Fourth Circuit decision now at issue, circuit decisions that place the burden of proof on the parents are as follows: **Fifth Circuit:** *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986), and *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983), *aff'd in part and rev'd in part sub nom. Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984); **Sixth Circuit:** *Doe v. Bd. of Educ.*, 9 F.3d 455, 458 (6th Cir. 1993); **Tenth Circuit:** *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990). *See* Pet. 17-21 (discussing circuit decisions placing burden on parents).

[21] The circuits that place the burden on the school district are as follows: **First Circuit:** *L.T. ex rel. N.B. v. Warwick School Comm.*, 361 F.3d 80, 82 n.1 (1st Cir. 2004) (*dictum*); **Second Circuit:** *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir. 1998); **Third Circuit:** *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 533 (3d Cir. 1995); *Oberti v. Board of Education*, 995 F.2d 1204, 1219 (3d Cir. 1993); **Seventh Circuit:** *Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002) (*dictum*); **Eighth Circuit:** *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999); and *E.S. v. Independent School District No. 196*, 135 F.3d 566, 569 (8th Cir. 1998); **Ninth Circuit:** *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1398 (9th Cir. 1994); and **D.C. Circuit:** *McKenzie v. Smith*, 771 F.2d 1527, 1532 (D.C. Cir. 1985) (*but see* Pet. 25, explaining

(Continued on following page)

Lascari, supra, a decision distinguished by its depth of analysis, the New Jersey Supreme Court has placed the burden of proof on the school district.[22]

It may also be helpful to note that, in carrying out their programs under the IDEA, several States have adopted statutes or regulations that place the burden on the school district.[23] On the other hand, in the 30 years since the IDEA was adopted in 1975, the petitioners are aware of no State that has adopted a statute or regulation purporting to place the burden on the parents merely because they challenge the IEP proposed by the school district.

SUMMARY OF ARGUMENT

"[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."

***Brown v. Board of Education*, 347 U.S. 483, 493 (1954)**

This case implicates the right of parents to obtain a free appropriate public education for their children with disabilities. It is a right once denied by many local school districts, but now firmly grounded in federal law – the

that the result in *McKenzie* may be better viewed as the result of regulation rather than a judicial allocation of the burden of proof). *See* Pet. 21-25 (discussing circuit decisions that place burdens on school districts).

[22] *See* Pet. 25-26 (discussing *Lascari*).

[23] *See, e.g.*, Alabama Administrative Code, Chapter 290-8-9-.08(8)(c)(6)(ii)(I) (placing burden of proof on school district at due process hearing); District of Columbia Mun. Regs. Title 5, § 3030.3 (same); Minnesota Rules 3525.3900(4)(f) (same); West Virginia Board of Education Regulations, Section 126-16-8.1.11c (same); Georgia Administrative Code, Rule 160-4-7-.18(1)(g)(8) (placing the burden on the school district except where parents propose a more restrictive environment.).

IDEA. It is, however, a right that is meaningful only if parents are able to hold local school districts accountable at the administrative hearings that are made available under that law.

The ability of parents to hold school districts accountable will be greatly affected by the answer this Court gives to the question presented by this petition. In an administrative hearing, which side has the burden of proof – the parents or the school district? It is a question that the IDEA does not address explicitly. Even so, the answer is inherent in the statute because (i) Congress clearly and unambiguously required that administrative hearings be governed by principles of "due process," 20 U.S.C. § 1415(f), and (ii) an analysis of due process principles dictates that the burden be placed on the school district.

When the three-prong due process inquiry recognized by this Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), is applied to IDEA administrative hearings, three conclusions emerge: Under the first prong, the private interest at stake – the right to an appropriate education – is very important. Under the second prong, there is a high risk of erroneously damaging that interest if the burden is placed on the parents, and there is no risk of such injury if the burden is placed on the school district. Under the third prong, the government interests, on balance, weigh in favor of ensuring the child an appropriate education rather than shielding any marginal or short-term savings that may be associated with providing the services in dispute. All three of these conclusions point to the school district as the party that must bear the burden of proof.

Because the result reached by using due process analysis is grounded in the statute, the Court need go no further. Even so, the appropriateness of placing the burden on the school district is confirmed by the other rules used by courts to allocate the burden of proof, including "policy and fairness." *Keyes v. School Dist. No. 1*, 413

U.S. 189, 209 (1973). In an administrative hearing under the IDEA, both policy and fairness call for the burden to be placed on the school district.

The policies at work in the IDEA are very clear. Congress sought not only to end discrimination against children with disabilities, but to ensure every such child an appropriate education. It also sought to hold school districts accountable, by requiring a consensus between the school district and parents in the development of an IEP, and by providing for an "impartial due process hearing" in the event of an impasse. Congress' effort to implement these policy objectives are fortified by placing the burden on the school district; they become enfeebled by placing the burden on the parents.

Fairness also calls for placing the burden on the school district. Where the evidence at a due process hearing is evenly balanced, the ruling should be for the parents because of the sharply different consequences of an erroneous decision. The child will suffer far more harm if contested services are erroneously denied, than the local school district will suffer if those services are erroneously ordered. Additionally, this Court has recognized the appropriateness of placing the burden of proof on the party having special access to the information on which the factual issue depends. In IDEA cases, that party is the school district.

In placing the burden on the parents, the Fourth Circuit failed to articulate a persuasive reason for its decision. Contrary to its perception, the "playing field" is not level. It remains tilted against parents – especially lower income parents – in a number of significant ways, undermining their ability to participate in IDEA hearings on equal terms. Placing the burden upon them would further aggravate the situation. For all of these reasons, the Court should give its approval to the majority rule,

place the burden on the school district, and reverse the court of appeals.

. ARGUMENT

"[A]ccountability is basic to the democratic system."
Senator Sam Ervin (1971)[24]

School districts are arms of government and, as such, they must be held accountable – just as all government must be held accountable. Indeed, the principle of accountability is a major component of the IDEA. Under this law, a school district is not just accountable to the public at large, it is accountable to specific individuals – the child and his parents. And, it is accountable not just through the political processes, but through administrative and legal processes designed to protect individual rights and ensure due process. Such rigorous accountability is part of Congress' response to the discrimination that children with disabilities once suffered in many school districts, and it is a principle that forms the essential background for the question presented by this case.

I. THE IDEA'S TEXT POINTS TO THE SCHOOL DISTRICT AS THE PARTY BEARING THE BURDEN OF PROOF.

Although the IDEA does not expressly allocate the burden of proof, a careful reading of its terms nevertheless compels the conclusion that, inherent in the statute, there is a requirement that the burden be placed on the school district. In establishing the IDEA, Congress did not merely require a "hearing," nor even an "impartial hearing." Instead, Congress required an "impartial *due process* hearing." 20 U.S.C. § 1415(f) (emphasis added). These words are not superfluous. *TRW Inc. v. Andrews*, 534 U.S.

[24] *Secrecy in a Free Society*, 213 Nation 454, 456 (1971).

19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (internal quotation marks and citations omitted).

Deliberately chosen by Congress, the term "due process" reflects a standard generally associated with constitutional law. Although the IDEA is a statute, by writing the term into the IDEA, Congress clearly and unambiguously incorporated the due process standard into the statutory scheme and, thus, established an equivalent level of protection at administrative hearings under the IDEA. As this Court has explained:

> Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, *it presumably knows and adopts the cluster of ideas that were attached to each borrowed word* in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.

Evans v. United States, 504 U.S. 255, 259 (1992) (emphasis added) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).[25] The same principle applies here. In using the familiar term "due process," Congress knew and adopted the "cluster of ideas" attached to those words, and

[25] Congress' intent to incorporate a constitutional standard into its statute is also consistent with the fact that Congress understood itself to be addressing an issue of constitutional proportions. *See* Education for All Handicapped Children Act, Pub. L. No. 94-142, § 3(a), 89 Stat. 75 (1975) (declaring that the purpose of the statute – a predecessor to the IDEA – was to "assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure *equal protection of the law.*") (emphasis added); *see also* Brief for the Arc of the United States, *et al.* at 20-22 (discussing legislative history showing constitutional concerns behind the IDEA).

it directed courts where to look in filling the interstices of the IDEA's protections.[26]

Applying the due process standard to administrative hearings under the IDEA calls for using the test outlined in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which explains that "identification of the specific dictates of due process generally requires consideration of three distinct factors." *Id.* at 335. Those factors are:

> [1] First, the *private interest* that will be affected by the official action;
>
> [2] Second, the *risk of an erroneous deprivation* of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
>
> [3] Finally, the *Government's interest*, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (emphasis added).[27]

In the context of the IDEA, all three factors point in the same direction. They argue for placing the burden of proof on the school district:

1. The "private interest" that will be affected is the free appropriate public education of a child with disabilities. This is the very interest that Congress intended to

[26] Even without Congress' use of this term, due process would be required at IDEA hearings as a matter of constitutional law. *See, e.g., Goss v. Lopez*, 419 U.S. 565, 574 (1975) ("[T]he State is constrained to recognize a student's legitimate entitlement to public education as a property interest which is protected by the Due Process Clause. . . .")

[27] As two members of the Court more recently noted, "[t]he balancing of equities that *Mathews v. Eldridge* outlines remains a useful guide in due process cases." *Medina v. California*, 505 U.S. 437, 453 (1992) (O'Connor, J., joined by Souter, J., concurring).

secure when it enacted the IDEA, and it is very substantial.

2. The "risk of erroneous deprivation" varies greatly, depending whether the burden of proof is placed on the parents or the school district. Because the level of proof is a preponderance of evidence, the allocation of the burden will affect the outcome of administrative hearings only in those cases where the evidence is in equipoise – that is, where the evidence that an IEP is appropriate is just as strong as the evidence that it is inappropriate. In such cases, there will be a fifty percent chance of an actual mistake in the hearing officer's decision, whichever way he decides; however, as *Mathews* explains, at this second step of the analysis, only the "private interest" is considered. Thus, the focus is on the education of the child.

If the evidence is in equipoise and the burden is placed on the parents, then the ruling will be in favor of the school district. There is a fifty percent chance that such a ruling will deprive the child of an appropriate education. Conversely, if the burden is placed on the school district, the ruling will be for the parents and the child will never be deprived of an appropriate education. Or, in the words of *Mathews*, if the burden is placed on the parents, the "risk of an erroneous deprivation" will be very high. Similarly, the value of the "substitute procedural safeguard" is also very high, because placing the burden on the school district safely eliminates the chance of such an erroneous deprivation.

3. The "government's interest" in these cases is twofold. First, the school district may have an interest in avoiding the expenditure of any additional resources that

would be associated with providing the services in dispute.[28] Second, under the IDEA, the government – local, state and national – also has an interest making sure that the child receives an appropriate education. This second governmental interest parallels the interest of the child and, thus, will be harmed if the parents must bear the burden of proof. These two separate governmental interests, on balance, weigh in favor of ensuring the child an appropriate education. As *Mills* explained, "the [government's] interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources." *Mills,* 348 F. Supp. at 876 (citing *Goldberg v. Kelley*, 397 U.S. 254, 266 (1969) (holding that State's interest in avoiding erroneous termination of welfare benefits "clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens")). Thus, the third *Mathews* factor – like the first two – favors placing the burden on the school district.

The result of this *Mathews* analysis is consistent with this Court's express articulation of the relationship between due process and the burden of proof. "[D]ue process places a heightened burden of proof *on the State* in civil proceedings in which the 'individual interests at stake . . . are both *particularly important* and *more substantial than mere loss of money*.'" *Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996) (quoting *Santosky v. Kramer*, 455 U.S. 745, 756 (1982)) (other internal quotation marks and citations omitted) (emphasis added). When this standard is applied to the IDEA, it is clear that the "individual interest" at stake – securing an appropriate education for a child with

[28] These additional resources often will have only a marginal impact on the government. Providing a few more hours of therapy each week, placing the child in a smaller classroom or providing some other accommodation easily within reach of the public school is often all that is required to make the difference between success and failure.

disabilities – is both "particularly important" and "more substantial than mere loss of money." While the *level* of proof is not at issue here, the *burden* of proof still must rest on the government – not the citizen – in order to comply with due process.

Such an allocation of the burden also mirrors the result in the two landmark disability rights cases that preceded the enactment of the IDEA, *Mills* and *PARC*. *See supra* at 4-5. In resolving constitutional challenges to discrimination against children with disabilities, both *Mills* and *PARC* required individualized hearings governed by due process, where the burden of proof was placed on the school district. *Mills*, 348 F. Supp. at 875-76, 881; *PARC*, 343 F. Supp. at 303, 305. As this Court has acknowledged, "the principles which [*Mills* and *PARC*] established are the principles which, to a significant extent, guided the drafters of the [IDEA]." *Rowley*, 458 U.S. at 194. Being thus guided by *Mills* and *PARC*, those drafters would hardly be surprised if this Court, like *Mills* and *PARC*, were to construe due process as placing the burden upon the school district.

This result is also reinforced by this Court's decisions in both *Burlington* and *Rowley*. Addressing in *Burlington* another IDEA safeguard (the "stay-put" requirement), the Court said: "We note that § 1415(e)(3) is located in a *section* detailing procedural safeguards which are largely for the *benefit of the parents and the child*." *Burlington*, 471 U.S. at 373. The section to which the Court was referring – § 1415 – is the same section where the requirement for "due process" is found.[29] Thus, it is also largely for the benefit of parents and children. Placing the

[29] *See, e.g.*, 20 U.S.C. § 1415(a) (requiring state and local procedures "*to ensure that children with disabilities and their parents are guaranteed procedural safeguards* with respect to the provision of a free appropriate public education.") (emphasis added).

burden of proof on the school district is consistent with the predominant congressional purpose. Placing the burden on the parents is not.

In *Rowley*, the Court had this to say:

> [A] court's inquiry [into suits brought under the IDEA] . . . will require a court not only *to satisfy itself* that the State has adopted the state plan, policies, and assurances required by the Act, but also *to determine* that the State has created an IEP for the child in question which conforms with the requirements of [the IDEA].

Rowley, 458 U.S. at 206 and n.27 (emphasis added).

To say that a court must "satisfy itself" and "determine" that the school district has complied with the IDEA is to say that there must be an *affirmative showing* of such compliance; and to require an affirmative showing is tantamount to requiring the party having the *duty* of compliance – *i.e.* the school district – to bear the burden of proof, even when the parents are the ones who initiated the complaint.

In sum, by deliberately incorporating concepts of due process into the IDEA, Congress made the allocation of the burden subject to the same principles that guide a due process analysis in other contexts. When these principles are applied to administrative hearings, it is clear that the school district must bear the burden of proof.

II. "POLICY AND FAIRNESS" REQUIRE THE BURDEN TO BE PLACED ON THE SCHOOL DISTRICT.

Even if the statutory requirement for "due process" were not a factor, the principles that govern allocation of the burden of proof would still require the burden to be placed on the school district.[30] As this Court has noted, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, is merely a question of *policy and fairness* based on experience in the different situations." *Keyes v. School Dist. No. 1*, 413 U.S. 189, 209 (1973) (internal quotation marks and citation omitted) (emphasis added) (quoting 9 J. Wigmore, *Evidence* § 2486, at 275 (3d ed. 1940)).

The Fourth Circuit acknowledged the relevance of this principle, Pet. App. 6, but failed to recognize its implications. As the following discussions will show, both "policy and fairness" require the school district to bear the burden. First, the policies underlying the IDEA are advanced by increasing the ability of parents to hold the school district accountable. Second, the consequences of an erroneous decision are much more onerous for the child than they are for the school district. Third, school districts have more access to – and control over – relevant facts and witnesses. Considered individually, each of these factors provides a compelling reason for placing the burden on the school district. Considered collectively, they make the case irrefutable.

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[30] *See, e.g.*, Brief of Various Autism Organizations at 8-15 (setting forth six separate considerations that compel placing the burden of proof on school districts).

A. Placing the Burden on the School District Advances the Congressional Policies Underlying the IDEA

Aptly described by the United States as "an important civil rights statute for children with disabilities," U.S. 2000 *Amicus* Brief at 1, the IDEA arose as our nation's response to the discrimination that these children once suffered at the hands of many local school authorities. *See supra* 4-5. As such, the IDEA has two great, overarching purposes. The first is to institute a system where school districts not only must end such discrimination, but must affirmatively provide every child with disabilities an appropriate education suitable for his or her individual needs. The second purpose is to empower parents to hold school districts accountable for the faithful performance of these duties, not only by giving parents an equal seat at the table when their child's education program is developed, but also by giving them the right to an "impartial due process hearing" in the event of an impasse.

These purposes are advanced by placing the burden on the school district, the party meant to be held accountable under the IDEA. They are not advanced by placing the burden on the parents, the parties meant to be protected. As explained by the United States in the court of appeals, "allocation of the burden of proof to the school is correct because it furthers the [IDEA's] mandate that schools provide FAPE [a free appropriate public education] to children with disabilities." U.S. 2000 *Amicus* Brief at 6. The United States then went on to say:

> [B]ecause the IDEA contemplates that the school would take the lead in . . . proposing an appropriate educational plan, it is entirely consistent with the statutory scheme to also require that the school be able to prove at the due process

> administrative hearing that the proposed IEP will provide FAPE to a child with a disability.

Id. at 12. On the other hand, "allocating the burden of proof to the parents would undermine the IDEA's provisions that ensure parents meaningful participation in developing the IEP." *Id.* at 12. Judge Luttig concurred with this assessment, concluding that "the policies behind the IDEA indisputably argue in favor of placing the burden of proof with the school district." Pet. App. 17 (Luttig, J., dissenting). It is an argument made even more convincing by the persistence of the prejudice and bias that prompted Congress to enact the IDEA. *See* Brief for the Arc of the United States, *et al.* at 22 (explaining that "[t]he same discriminatory conditions that impelled Congress to enact the IDEA continue to exist.").[31]

Unmoved by the policy argument, the Fourth Circuit still did not dispute it. Instead, the panel majority adhered to the "tendency" to place the burden of proof on the party seeking a change, Pet. App. 6, and it offered the analogy of other civil rights statutes where the burden is borne by the plaintiff. Pet. App. 8-9. The analogy is misplaced. Discrimination takes many forms, as do the measures adopted by Congress to combat it. The requirements of the IDEA set this law apart from other civil rights statutes and make them poor analogies for allocating the burden here. Other civil rights statutes prohibit discrimination, but most of them differ from the IDEA in that they do not

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[31] Undoubtedly, some local school authorities have warmly embraced their new obligations, but others skimpily withhold the full measure the law requires while others verge on open defiance. *See, e.g., Emma C. v. Eastin*, No. C96-4179, 2001 U.S. Dist. LEXIS 16099 (N.D. Cal. Oct. 4, 2001) (holding local school district in contempt for failure to implement court-ordered plan to remedy widespread violations of the IDEA).

impose affirmative obligations. While there are other civil rights statutes that impose affirmative obligations – *e.g.*, Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.* – those statutes can be readily distinguished. First, such other statutes typically apply across the board to a wide range of businesses and institutions having a multitude of purposes and missions. Unlike the IDEA, they are not focused on a narrow category of institutions – *e.g.*, public schools – whose purpose is directed to serving the individuals whose rights are at issue. In other words, while a business subject to the ADA must provide certain accommodations to its employees, serving the welfare of those employees is not the *raison d'etre* of the business. The *purpose* of the business is to produce a product or service and make a profit. For public schools, on the other hand, educating children *is* their *raison d'etre*. To say that a student or his parents should have the burden of proof under the IDEA, because an employee may have that burden under the ADA, is comparing apples and oranges.

Second, other statutes that impose affirmative obligations typically require the business or institution to make a reasonable response to *requests* for an accommodation. The IDEA goes much further and requires the school district to *seek out* children who need special education services and *ensure* that they receive the education to which the law entitles them. *See* Brief of *Amicus Curiae* Council of Parent Attorneys and Advocates, *et al.* at 8-9. The other statutes typically do not require a formal collaborative process, such as the highly detailed procedure that the IDEA requires in the development of an IEP. Nor do other statutes typically provide an administrative hearing to resolve any impasse. In each of these ways, the affirmative obligation imposed by the IDEA is different

from the duty to accommodate arising under other statutes. It is perfectly consistent with these differences that the burden of proof be different as well.

It is also significant that the *fora* in which the burdens apply are also different. In the case at bar, the forum where the burden is at issue is an administrative hearing, not a state or federal court, where claims would be brought for adjudication under other federal statutes. While a hearing officer's decision may be appealed to such a court, the question of who bears the burden if the case reaches court is not an issue in this case. To require parents who initiate a complaint to bear the burden of proof at the *administrative* level under the IDEA, because a plaintiff suing under a different statute may have to bear the burden in *court*, is a *non-sequitur*.

The difficulties parents encounter in securing an appropriate education for their child will be either exacerbated or ameliorated by whether they bear the burden of proof in a due process hearing. But there is more. The allocation of the burden also affects the outcome of cases that never reach the hearing stage.[32] When parents and the school district sit down to negotiate a child's IEP, an awareness of who will bear the burden if there is an impasse can significantly affect the negotiation dynamics. Placing the burden on the parents significantly strengthens the hand of often-intransigent school district bureaucracies. On the other hand, "assigning the burden of proof

[32] Many more hearings are requested than are actually held. *See* Government Accounting Office, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate (Sept. 2003) at 13 (noting that 11,068 hearings were requested in 2000, but only 3,020 were held). Such a discrepancy suggests that many parents find the process too daunting and simply capitulate.

to the school . . . serves as an additional incentive for school officials to draft IEPs that provide FAPE to children with disabilities." U.S. 2000 *Amicus* Brief at 12. Moreover, placing the burden on the school district is consistent with "Congress' effort to *maximize* parental involvement in the education of each handicapped child." *Rowley*, 458 U.S. at 183 n.6 (emphasis added).[33] For this reason, as well, policy considerations strongly favor the rule adopted by the majority of circuits.

B. The Sharply Different Consequences of an Erroneous Decision Require the School District to Bear the Burden of Proof.

Allocating the burden of proof also must be guided by "fairness based on experience." *Keyes*, 413 U.S. at 209. The goal of fairness requires a balancing of competing equities. In making decisions about the burden of proof – especially where government is a party – this means considering "the consequences of an erroneous factual determination." *In re Winship*, 397 U.S. 358, 373 (1970) (Harlan, J., concurring). Indeed, concerns about the consequences of such error are found at the heart of many of this Court's cases about the burden of proof. *See, e.g., Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 283 (1990) (withdrawal of life-support); *Santosky v. Kramer*, 455 U.S. 745, 765-66 (1982) (termination of parental rights); *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276, 286 (1966) (deportation). While these concerns about the consequences of error have often affected the *level* of proof

[33] *See* Brief for the Arc of the United States, *et al.* at 26-28 (discussing how allocation of the burden of proof affects parties in earlier stages of IEP development process); Brief of *Amicus Curiae* Council of Parent Attorneys and Advocates, *et al.* at 20-23 (same).

required (an issue not present here), the same concerns have direct relevance to the *allocation* of the burden between citizens and their government.

When the evidence at a due process hearing is in equipoise, the ruling should be for the parents because of the sharply different consequences of an erroneous decision. The child will suffer far more harm if contested services are erroneously denied, than the local school district will suffer if those services are erroneously ordered.[34] Given this discrepancy, the burden of proof – sometimes called the risk of non-persuasion – must be placed on the school district.

If a child is mistakenly denied the services he needs, it can cause "a substantial setback in the child's development." 121 Cong. Rec. 37412, 37416 (daily ed. Nov. 19, 1975) (statement of Sen. Stafford). Moreover, there may not be a second chance to correct the error. Even if the mistake is recognized later in the child's school career, the harm caused by the delay is likely to require far more intensive intervention, and it will often be irreparable. As explained by the First Circuit:

[34] While there may be exceptions to this observation, burdens of proof are not allocated based on exceptions:

> Standards of proof, like other 'procedural due process rules[,] are shaped by the risk of error inherent in the truth-finding process as applied to the *generality of cases*, not the rare exceptions.' Since the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, the standard of proof necessarily must be calibrated in advance.

Santosky v. Kramer, 455 U.S. 745, 757 (1982) (quoting *Mathews*, 424 U.S. at 344) (emphasis added in *Santosky*).

> Current research indicates that full development of reading and other skills will more likely occur with learning disabled children . . . if adequate remedial services are provided in the early primary grades. Later intervention generally appears to require special services over a longer period of time to achieve a similar rate of remediation. Some skills must be learned early in the brain's maturation process for them to be learned well, or in some cases, at all. *Delay in remedial teaching is therefore likely to be highly injurious to such children.*

Town of Burlington v. Department of Education, 736 F.2d 773, 798 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985) (emphasis added).

For some disabilities, a delay in services can be especially devastating. One such example is autism,[35] a disability of increasing prevalence.[36] "[F]or children who suffer from autism, there is a *small, but vital, window of opportunity* in which they can effectively learn. Such period is generally between the ages of five and eight years old." *Lawyer v. Chesterfield*, 19 IDELR 904 (E.D. Va. 1993) (emphasis added) (basing decision on expert testimony).[37] A similar example can be found among some

[35] "Autism adversely impacts the normal development of the brain in the areas of social interaction and communication skills. Individuals suffering from autism experience, *inter alia*, preoccupation with inner thoughts, daydreams, and fantasies, and they have difficulty communicating." *MM v. Sch. Dist.*, 303 F.3d 523, 528 n.6 (4th Cir. 2002).

[36] For example, among the age group 6 through 11, the number of children with autism served by the IDEA increased more then six-fold over ten years, growing from 13,716 in 1994 to 85,995 in 2003. <*www.ideadata.org/tables27th/ar_aa9.htm*>.

[37] *Accord JH v. Henrico County Sch. Bd.*, 395 F.3d 185, 190 (4th Cir. 2005) ("children have a great window of opportunity for language learning that begins to close by age eight or nine, and thus, 'if you mark time with a child who has autism, you lose. . . .'") (discussing testimony

(Continued on following page)

children with severe hearing loss. *E.g., Board of Educ. v. Jeff S.*, 184 F. Supp. 2d 790, 793 (C.D. Ill. 2002) ("There is a critical window of opportunity for a child with a cochlear implant to learn to hear and speak during which [auditory verbal therapy] is implemented."). Similar examples can also be found among the myriad of other disabilities afflicting children served by the IDEA. *See supra* at 6-7. But whether the harm caused by delay is simply difficult to repair – or is actually irreparable – the point is the same: if the evidence is in equipoise, a judgment in favor of the school district will risk substantial harm to the education of the child.[38]

On the other hand, where the evidence is evenly balanced, a judgment in favor of the parents will typically risk little or no harm to the school district. Schools are often able to leverage a marginal increase in resources into an enormous difference in the child's outcome.[39] In the case at bar, for example, the school district could have offered Brian, in the beginning, the specialized program that it eventually agreed to provide – but initially refused. Fortunately for Brian, his parents had the means to place him in a private school where he could obtain the services he needed until the school district changed its mind. See *supra* at 13. But, most parents will not have this option. For the vast majority of children with disabilities, the

of Ronald David, M.D., associate clinical professor of pediatrics at the Medical College of Virginia, and an expert in pediatric neurology and autism).

[38] Indeed, because later intervention is typically more expensive than early intervention, *see Burlington*, 736 F.2d at 798, a judgment in favor of the parents will often save the school district money in the long run.

[39] Of course, even when the additional expenditure is substantial, the interest of the child in an appropriate education must be paramount. *E.g., Mills*, 348 F. Supp. at 876; *see also Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

costs of an erroneous decision will not be paid in monetary terms, but in the squandering of human potential.

Our law always has reflected a special solicitude for children. *E.g., Ridgway v. Ridgway*, 454 U.S. 46, 69 (1981) (Powell, J., joined by Rehnquist, J., dissenting). It also reflects a special solicitude for the "primary role of the parents in the upbringing of their children," a role "now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Such solicitude makes it especially appropriate to rule in favor of the child – and his parents – when the evidence is in equipoise.[40] Indeed, the principle that the law should show special concern for children is rooted in the fact that "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Thus, it is not just the children who will suffer from erroneous decisions in favor of school districts. Society at large will also pay the price. As this Court has already recognized, "providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." *Rowley*, 458 U.S. 176, 201 n.23 (quoting 121 Cong. Rec. 19492) (1975) (remarks of Sen. Williams)).[41]

[40] "Though parents have some rights under the IDEA, the child, not the parents, is the real party in interest in any IDEA proceeding." *Doe v. Board of Educ.*, 165 F.3d 260, 263 (4th Cir. 1998). For the most part, then "references to parents are best understood as accommodations to the fact of the child's incapacity." *Id.*

[41] *See, e.g.*, Brief of Various Autism Organizations at 25 (noting the growing need for institutional care for adolescents with autism and reporting estimates of long-term savings where there is "widespread, early and effective" intervention).

Conversely, denying such service – even by a well-meaning mistake – will consign many of these individuals to a life of dependency. For this reason, too, when the evidence is evenly balanced, the judgment of the hearing officer should favor the parents.

C. School Districts Have More Access to – and Control Over – Relevant Facts and Witnesses

Achieving "fairness based on experience," *Keyes*, 413 U.S. at 209, often means placing the burden of proof on the party having superior access to and control over key evidence. As this Court has explained, "[t]he *ordinary rule*, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *United States v. New York, New Haven & Hartford R.R. Co.*, 355 U.S. 253, 256 n.5 (1957) (emphasis added). Indeed, it is "entirely sensible to burden the party more likely to have information relevant to the facts about [the matter at issue] with the obligation to demonstrate [the] facts. . . . Such was the rule at common law." *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 626 (1993) (citing authorities). *See* J. Strong, *McCormick on Evidence* § 337 (5th ed. 1999) ("A doctrine often repeated by the courts is that where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.").

Adhering to this principle, lower courts placing the burden of proof on the school district have often explained their decisions by noting that school officials have greater access to and control over evidence pertaining to the appropriateness of its proposed IEP. In *Lascari*, the Supreme Court of New Jersey explained that requiring the

school district to bear the burden is "consistent with the proposition that the burdens of persuasion and production should be placed on the party better able to meet those burdens." 560 A.2d 1180, 1188 (N.J. 1989). As *Lascari* observed:

> The school board, with its recourse to the child-study team and other experts, has ready access to the expertise needed to formulate an IEP. Through the child-study team, the board generally has extensive records pertaining to a handicapped child. The board is also conversant with the federal and State laws dictating what the district must provide to handicapped children in order to comply with the EAHCA. . . . By contrast, parents may lack the expertise needed to formulate an appropriate education for their child.

Id.

The Third Circuit used a similar rationale. As it explained:

> In practical terms, the school has an advantage when a dispute arises under the Act: the school has better access to the relevant information, greater control over the potentially more persuasive witnesses (those who have been directly involved with the child's education), and greater overall educational expertise than the parents.

Oberti, 995 F.2d at 1219 (placing the burden on the school district in terms broad enough to encompass both administrative and judicial proceedings).

The same rationale figured prominently in the case at bar when the district court relied on *Lascari* in reaching its decision to place the burden on the school district, Pet. App. 36-39, and when Judge Luttig penned his dissent at

the court of appeals. As he noted, "[p]arents simply do not have, and cannot easily acquire, the cumulative, institutional knowledge gained by representatives of the school district from their experiences with other, similarly-disabled children." Pet. App. 19.

The approach followed by *Lascari*, *Oberti*, the district court and Judge Luttig mirrors the assessment offered by the U.S. Department of Education and the U.S. Department of Justice, Civil Rights Division. As they explained in 2000: "Fairness principles also call for assigning the burden of proof to the party that controls the essential evidence or possesses superior knowledge of the facts, *which in this case is the school*." U.S. 2000 *Amicus* Brief at 13 (emphasis added).

The United States was correct in its assessment. The school district typically has a better opportunity to observe the child in an educational setting and to interpret those observations. School districts typically have employees or consultants whom they may readily call upon to present expert testimony; and, while some parents may have the ability to retain their own outside experts, most will not. Parents may have access to their child's school records; however, the school district in large measure controls what records are created, what information is included in those records and what information is left for presentation *ore tenus* or not mentioned at all. And parents do not even have a right to observe the educational placement proposed by the school district.[42] Finally, the school district is

[42] *See, e.g.*, Letter to S. Mamas from Office of Special Education Programs (May 26, 2004), 42 IDELR 10 ("[N]either the statute nor the regulations implementing the IDEA provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement."); *accord Hanson v. Smith*, 212 F. Supp. 2d 474, 487 (D. Md. 2002) ("There is no language in the IDEA requiring a school board to allow parents to visit the school of the proposed placement.").

in a position to explain the range of educational options available and to demonstrate why it has chosen a particular option for its proposed IEP.

Of course, there will be parents from time to time who come to the table with a high degree of resources, knowledge and sophistication; however, such parents are the exception, not the rule. "For the vast majority of parents . . . , the specialized language and technical educational analysis with which they must familiarize themselves as a consequence of their child's disability will likely be obscure, if not bewildering." Pet. App. 20 (Luttig, J., dissenting). It is, of course, the "*generality* of cases, not the rare exceptions" that determine how the burden of proof will be shaped. *Santosky v. Kramer*, 455 U.S. 745, 757 (1982) (quoting *Mathews*, 424 U.S. at 344) (emphasis added in *Santosky*).

Moreover, even when parents are sophisticated, school districts remain uniquely positioned to collect and evaluate information about how well their programs have worked for students having similar disabilities. If they are developed and presented, such professional program assessments can be very useful to a hearing officer in determining whether a proposed placement or a proposed level of services is appropriate for a particular child. On the other hand, parents rarely have experience with IEPs outside their own family and, because of privacy concerns, cannot realistically obtain information about whether the school district has succeeded with other children to whom similar programs were provided. *See, e.g.*, The Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(b)(1) (imposing non-disclosure requirements on student records as condition of receiving federal funds).

In another situation involving government programs for individuals with disabilities, the government is required to bear the burden of proof where relevant information is peculiarly available to it. This useful analogy is found in the law governing Social Security disability. Once a claimant makes a certain showing of eligibility for benefits, "the burden of proof shifts to the Secretary [of Health and Human Services] to show that the claimant, given her age, education and work experience, has the capacity to perform specific jobs that exist in the national economy." *Rossi v. Califano*, 602 F.2d 55, 57 (3d Cir. 1979).[43]

Placing this burden on the government is "not statutory, but is a long-standing judicial gloss on the Social Security Act." *Walker v. Bowen*, 834 F.2d 635, 640 n.3 (7th Cir. 1987). It reflects the common sense view that the government is in a far better position than the individual citizen to collect and evaluate data about the jobs that are available in the national economy and what may be suited to a particular individual. As the Third Circuit explained:

> [I]nformation as to the availability of jobs in the national economy is sophisticated information that most individuals do not have the resources to prove or disprove. The Secretary, on the other hand, has vast resources and information at his disposal. Thus, considerations of fairness and policy require that the Secretary bear the risk of non-persuasion on the element of disability on

[43] Other circuits reaching the same result include: *Butts v. Barnhart*, 388 F.3d 377 (2d Cir. 2004); *Eichelberger v. Barnhart*, 390 F.3d 584 (8th Cir. 2004); *Jones v. Commissioner of Social Security*, 336 F.3d 469 (6th Cir. 2003); *Thomas v. Barnhart*, 278 F.3d 947 (9th Cir. 2002); *Brown v. Arpel*, 192 F.3d 492 (5th Cir. 1999); *Lewis v. Weinberger*, 541 F.2d 417 (4th Cir. 1976); *Hernandez v. Weinberger*, 493 F.2d 1120 (1st Cir. 1976).

> which the Secretary is in a better position than the claimant to introduce evidence.

Torres v. Schweiker, 682 F.2d 109, 111-12 (3d Cir. 1982).

So, too, the school district has sophisticated information that most individuals do not have available to them. Under the IDEA, where eligibility for services is established (a factor not at issue here), the government should bear the burden of showing that the program it has proposed is suitable for the child. Indeed, the case for imposing such a burden on the school district is even stronger than the case for imposing it on the Secretary. Under Social Security law, the Secretary has no obligation to *provide* the claimant with an appropriate job, whereas the school district does have the obligation to provide the child with an appropriate education. The school district should be required to step forward and show why the program it has devised satisfies its legal obligation.

Under the IDEA, the school district has an affirmative legal duty to develop an appropriate IEP. It is not supposed to propose an IEP – much less *insist* upon its proposal – without a sound basis. If the school district has fulfilled this duty, it will have its proof readily available, and it ought not to be reluctant about going before a hearing officer to justify its position. This is especially so given that the hearing officer is "a representative of the state presumed to have both the educational expertise and the ability to resolve questions of educational methodology." *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 865 (6th Cir. 2004). Under the IDEA, a State must have in effect "policies and procedures to *ensure* that . . . [a] free appropriate public education is available to all children with disabilities residing in the State. . . . " 20 U.S.C. § 1412(a). To require the school district to bear the burden of proof is simply to require it to provide the hearing officer, in individual cases, the same sort of assurances

that the State must make on a larger scale as a condition of participation.

At the end of the day, "the school district is . . . in a far better position to demonstrate that it has fulfilled this obligation [to develop a suitable IEP] than the disabled student's parents are in to show that the school district has failed to do so." Pet. App. 16 (Luttig, J., dissenting). With all the advantages at its command, if the school district cannot show that it has proposed an appropriate IEP, it is only fair for the judgment to go against it.

III. THE RATIONALE USED BY THE FOURTH CIRCUIT IS FLAWED – THE "PLAYING FIELD" IS NOT LEVEL.

The Fourth Circuit did not offer any reason for placing the burden on the parents, other than its failure to see any reason for placing it on the school district. *See* Pet. App. 15. Nor did the Fourth Circuit deny that the school district has superior access to evidence about the appropriateness of its proposed IEP. *See* Pet. App. 9. Instead, the decision below reviewed other protections available to parents under the IDEA and concluded that the "playing field" is "level" without placing the burden of proof on the school district. Pet. App. 9. This approach is flawed.

To begin, the principal protections available to parents in an administrative hearing – notices, right to counsel, limited discovery rights – are comparable to (or less than) what litigants enjoy in *judicial* proceedings.[**] These

[**] Other protections listed by the Fourth Circuit apply to stages in the IEP process *before* the hearing stage. For example, parents have the right to participate in IEP meetings, to request an independent evaluation, to review school records and to seek mediation. Yet, when efforts at joint development of an IEP reach an impasse, these pre-hearing protections are hardly sufficient to eliminate the natural advantages the school district will enjoy in an adversarial hearing.

protections do not vitiate the rule that imposes the burden on the party having peculiar knowledge of the facts. They do not do so in a judicial setting; they ought not do so in an administrative setting, either.

Moreover, in matters affecting children, there is an inherent asymmetry between parents and the school district, which the Fourth Circuit unnecessarily turned into a disadvantage for parents. When parents and school officials sit down to develop an IEP, they come to the table – in the eyes of the law – as "equal partners." USDOE Question 9, *supra*. Similarly, when there is an impasse, either side has the right to request an administrative hearing. *See supra* at 7. As a practical matter, however, it is almost always the parents who make the request. The school district has little incentive to initiate the process. Without a formal IEP in place, the school district may simply withhold the contested services – perhaps, all special education services – and thereby have its own way, or else maneuver the parents into making the first move. In a setting where, as the Fourth Circuit acknowledges, the playing field is *supposed* to be level, this Court should not allow one side in the controversy to impose the burden of proof on the other by the use of such a tactic. This is especially so when the tactic is employed by a public agency entrusted by parents with the education of their children. It is even more inappropriate when the *reason* for allowing such a tactic to succeed would simply be the "tendency" or "tradition" of placing the burden on the side first challenging the other. *See* Pet. App. at 6, 15 (panel majority).

Other advantages are also available to the school district. A few examples will illustrate the point.[46] Many

[46] *See* Brief for the Arc of the United States at 9-18 (discussing in detail multiple advantages that school districts enjoy over parents);
(Continued on following page)

school districts have attorneys on staff. Others have substantial budgets for hiring outside counsel.[46] For parents, engaging an attorney can often be a daunting task and, while Brian's parents were not deterred by this obstacle, many parents will be unable to find – or afford – counsel skilled in this area of the law. Thus, it is not surprising that schools are "much more likely to bring an attorney to a hearing than parents." 150 Cong. Rec. S5350-51 (daily ed. May 12, 2004) (Statement of Sen. Kennedy).[47]

Similarly, school districts typically have ready access to expert witnesses, often through their own employees but sometimes through expensive outside consultants.[48] On the other hand, parents must find and retain experts, paying for them out of far more limited budgets. In some circuits, parents who prevail may recoup these expenditures as part of the costs.[49] Yet, in other circuits, such

Brief of *Amicus Curiae* Council of Parent Attorneys and Advocates *et al.* at 16-23 (same).

[46] *See, e.g.*, Atlanta Law Firm Charges to County Top $1.7 Million, the Chattanoogan.com (Mar. 14, 2005) (reporting that the school system of Hamilton County, Tennessee has incurred more than $1.7 million in legal fees in one special education case, which is still on-going) *available at* <www.chattanoogan.com/articles/article_63675.asp> (visited Apr. 23, 2005).

[47] Senator Kennedy's assessment is based on 2003 data from the States, calculating what percentage of the time parents and schools, respectively, used attorneys. States and percentages listed by Senator Kennedy were: California: parents (21%), schools (42%); Missouri: parents (60%), schools (87%); Connecticut: parents (65%), schools (95%); Illinois: parents (35%), schools (91%); New York: parents (31%), schools (100%). 150 Cong. Rec. S5350-51.

[48] *See, e.g.*, the Chattanooga.com, *supra* (reporting that Hamilton County incurred more than $690,000 in expert witness fees and expenses in the same case).

[49] *E.g., Arons v. New Jersey State Bd. of Educ.*, 842 F.2d 58, 62 (3d Cir. 1988) (allowing parents who prevail compensation for expert witness fees); *Murphy v. Arlington Central Sch. Dist. Bd. of Educ.*, 402 F.3d 332 (2d Cir. 2005) (same).

compensation is not available.[50] Even where parents are allowed such compensation, cutting costs on expert witnesses may be necessary to hedge against the possibility of an adverse decision, to pay for services the school district will not provide or simply because parents do not have the money. In this way, too, the playing field is not level.

The ability of the parties to know about – and to limit – each other's case is also skewed in favor of the school district. When a party – typically the parents – requests a hearing, that party becomes obligated to provide a detailed statement of its case. This statement must describe "the nature of the problem" with the proposed IEP as well as "facts relating to such problem." 20 U.S.C. § 1415(b)(7)(A)(ii)(III). The initiating party also must provide "a proposed resolution of the problem to the extent known and available" at the time. *Id.* at § 1415(b)(7)(A)(ii)(IV). Parents who provide such a statement of their case, but seek to stray from it at the hearing, are likely to find themselves facing a successful objection from the school district. Such pleading requirement would seem unremarkable if the other party – typically the school district – were required to respond with a competing pleading. However, there is no such requirement. Thus, the school district has both a head start and wider latitude in getting ready for the hearing. For the school district to enjoy such advantages in the preparation of its case is yet another reason why the school district should be prepared to prove that case.

While many of the disadvantages experienced by parents fall upon families of all economic backgrounds, they fall most heavily upon families with lower incomes. As explained by the U.S. Department of Education:

[50] *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003) (denying compensation for expert witnesses) and *T.D. v. LaGrange School Dist. No. 102*, 349 F.3d 469 (7th Cir. 2003) (same).

> "Due process hearings are *expensive* for all parties, time-consuming, and are not undertaken lightly, so due process hearings are universally understood to be a marker of serious unresolved differences about a student's need for special education and related services or the nature or location of services."

Government Accounting Office, Report to the Ranking Minority Member, Committee on Health, Education, Labor and Pensions, U.S. Senate (Sept. 2003) ("GAO Report") at 1, 29 (reproducing letter from Assistant Secretary of Education, R.H. Pasternack, Ph.D.) (emphasis added). Consistent with this observation about expense, the GAO reports a "significant relationship" between household incomes and hearing requests. GAO Report at 15 n.22. Not surprisingly, households with lower incomes are less likely than households with higher incomes to request a due process hearing. *Id.* The problem is compounded by the fact that a high percentage of children with disabilities (24 percent) come from households in poverty. *See* MARY WAGNOR & JOSE BLACKORBY, OVERVIEW OF FINDINGS FROM WAVE 1 OF THE SPECIAL EDUCATION ELEMENTARY LONGITUDINAL STUDY (SEELS) (2004) at 5, *available at* http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf (reporting results of study implemented by U.S. Department of Education). Minority children with disabilities also face special challenges. *See* 20 U.S.C. § 1400(c)(12)(A) (2005) (formerly § 1400(c)(8)(A)). ("[G]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.").

It is *these* families – the ones most in need of the services of public schools – who are least able to muster the resources to overcome the burden of proof placed upon them by the decision below. Bearing in mind what Judge

Luttig called "the full mix of parents," Pet. App. at 20, it is especially inappropriate to treat the playing field as level.

In sum, contrary to the assessment offered by the Fourth Circuit, the playing field is tilted against parents. To make them bear the burden of proof, based on a belief that the field is somehow level, is simply unrealistic. The Fourth Circuit's decision is flawed. In IDEA administrative hearings, the "tendency" or "tradition" of assigning the burden to the party who initiates the litigation must give way to concerns about "policy and fairness." *Keyes*, 413 U.S. at 209. The burden must be fixed upon the school district.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BRIAN SCHAFFER, a minor, by his parents and next friends, Jocelyn Schaeffer and Martin Schaeffer; JOCELYN SCHAFFER; and MARTIN SCHAFFER

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April 29, 2005

20 USCS § 1400 (2005)

§ 1400. Short title; table of contents; findings; purposes [This section takes effect on July 1, 2005, pursuant to § 302(a) of Act Dec. 3, 2004, P.L. 108-446.]

(a) Short title. This title [20 USCS §§ 1400 et seq.] may be cited as the "Individuals with Disabilities Education Act".

(b) [Omitted]

(c) Findings. Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) [enacted Nov. 29, 1975], the educational needs of millions of children with disabilities were not being fully met because –

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;

(C) undiagnosed disabilities prevented the children from having a successful educational experience; or

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975 [enacted Nov. 29, 1975], this title [20 USCS §§ 1400 et seq.] has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this title [20 USCS §§ 1400 et seq.] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by –

(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to –

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;

(B) strengthening the role and responsibility of parents and ensuring that families of such children have

meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this title [20 USCS §§ 1400 et seq.] with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965, in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;

(E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of scientifically based instructional practices, to the maximum extent possible;

(F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children;

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and

(H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.

(6) While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(8) Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.

(9) Teachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes.

(10) (A) The Federal Government must be responsive to the growing needs of an increasingly diverse society.

(B) America's ethnic profile is rapidly changing. In 2000, 1 of every 3 persons in the United States was a member of a minority group or was limited English proficient.

(C) Minority children comprise an increasing percentage of public school students.

(D) With such changing demographics, recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students.

(11) (A) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation.

(B) Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education.

(C) Such discrepancies pose a special challenge for special education in the referral of, assessment of, and provision of services for, our Nation's students from non-English language backgrounds.

(12) (A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) African-American children are identified as having mental retardation and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998-1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.

(13) (A) As the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.

(B) The opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this title [20 USCS §§ 1400 et seq.], peer review panels, and training of professionals in the area of special education is essential to obtain greater success in the education of minority children with disabilities.

(14) As the graduation rates for children with disabilities continue to climb, providing effective transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities.

(d) Purposes. The purposes of this title [20 USCS §§ 1400 et seq.] are –

(1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services

designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

HISTORY:

(April 13, 1970, P.L. 91-230, Title VI, Part A, § 601, as added Dec. 3, 2004, P.L. 108-446, Title I, § 101, 118 Stat. 2647.)

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20 USCS § 1415 (2005)

§ 1415. Procedural safeguards [This section takes effect on July 1, 2005, pursuant to § 302(a) of Act Dec. 3, 2004, P.L. 108-446.]

(a) Establishment of procedures. Any State educational agency, State agency, or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures. The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2) (A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of –

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)), the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency –

(A) proposes to initiate or change; or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

(6) An opportunity for any party to present a complaint –

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

(7) (A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential) –

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include –

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

(c) Notification requirements.

(1) Content of prior written notice. The notice required by subsection (b)(3) shall include –

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this part [20 USCS §§ 1411 et seq.] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this part [20 USCS §§ 1411 et seq.];

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

(2) Due process complaint notice.

(A) Complaint. The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

(B) Response to complaint.

(i) Local educational agency response.

(I) In general. If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include –

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency. A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint [sic] notice was insufficient where appropriate.

(ii) Other party response. Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint [sic] a response that specifically addresses the issues raised in the complaint.

(C) Timing. The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

(D) Determination. Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.

(E) Amended complaint notice.

(i) In general. A party may amend its due process complaint notice only if –

(I) the other party consents in writing to such amendment and is given the opportunity to resolve

the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(ii) Applicable timeline. The applicable timeline for a due process hearing under this part [20 USCS §§ 1411 et seq.] shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

(d) Procedural safeguards notice.

(1) In general.

(A) Copy to parents. A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents –

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by a parent.

(B) Internet website. A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents. The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it

clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to –

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including –

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) Mediation.

(1) In general. Any State educational agency or local educational agency that receives assistance under this part [20 USCS §§ 1411 et seq.] shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

(2) Requirements. Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process –

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this part [20 USCS §§ 1411 et seq.]; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) Opportunity to meet with a disinterested party. A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to

meet, at a time and location convenient to the parents, with a disinterested party who is under contract with –

(i) a parent training and information center or community parent resource center in the State established under section 671 or 672 [20 USCS § 1471 or 1472]; or

(ii) an appropriate alternative dispute resolution entity, to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) List of qualified mediators. The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) Costs. The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Scheduling and location. Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) Written agreement. In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that –

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) Mediation discussions. Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

(f) Impartial due process hearing.

(1) In general.

(A) Hearing. Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session.

(i) Preliminary meeting. Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint –

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint, unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing. If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this part [20 USCS §§ 1411 et seq.] shall commence.

(iii) Written settlement agreement. In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is –

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period. If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations.

(A) In general. Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

(B) Failure to disclose. A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing.

(A) Person conducting hearing. A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum –

(i) not be –

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this title [20 USCS §§ 1400 et seq.], Federal and State regulations pertaining to this

title [20 USCS §§ 1400 et seq.], and legal interpretations of this title [20 USCS §§ 1400 et seq.] by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing. The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows.

(D) Exceptions to the timeline. The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to –

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this part [20 USCS §§ 1411 et seq.] to be provided to the parent.

(E) Decision of hearing officer.

(i) In general. Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction. Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction. Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

(g) Appeal.

(1) In general. If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision. The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards. Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded –

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions –

(A) shall be made available to the public consistent with the requirements of section 617(b) [20 USCS § 1417(b)] (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 612(a)(21) [20 USCS § 1412(a)(21)].

(i) Administrative procedures.

(1) In general.

(A) Decision made in hearing. A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal. A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action.

(A) In general. Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation. The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows.

(C) Additional requirements. In any action brought under this paragraph, the court –

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees.

(A) In general. The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees.

(i) In general. In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs –

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of

a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction. Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees. Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services.

(i) In general. Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if –

(I) the offer is made within the time prescribed by *Rule 68 of the Federal Rules of Civil Procedure* or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP team meetings. Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints. A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered –

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs. Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees. Except as provided in subparagraph (G), whenever the court finds that –

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A), the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees. The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement. Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting.

(1) Authority of school personnel.

(A) Case-by-case determination. School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

(B) Authority. School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) Additional authority. If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 612(a)(1) [20 USCS § 1412(a)(1)] although it may be provided in an interim alternative educational setting.

(D) Services. A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall –

(i) continue to receive educational services, as provided in section 612(a)(1) [20 USCS § 1412(a)(1)], so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services

and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination.

(i) In general. Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine –

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation. If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation. If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall –

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

(G) Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child –

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) Notification. Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) Determination of setting. The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) Appeal.

(A) In general. The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer.

(i) In general. A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order. In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may –

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

(4) Placement during appeals. When an appeal under paragraph (3) has been requested by either the parent or the local educational agency –

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

(5) Protections for children not yet eligible for special education and related services.

(A) In general. A child who has not been determined to be eligible for special education and related services under this part [20 USCS §§ 1411 et seq.] and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this part [20 USCS §§ 1411 et seq.] if the local educational agency had knowledge (as determined in

this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge. A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred –

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 614(a)(1)(B) [20 USCS § 1414(a)(1)(B)]; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(C) Exception. A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 614 [20 USCS § 1414] or has refused services under this part [20 USCS §§ 1411 et seq.] or the child has been evaluated and it was determined that the child was not a child with a disability under this part [20 USCS §§ 1411 et seq.].

(D) Conditions that apply if no basis of knowledge.

(i) In general. If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations. If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this part [20 USCS §§ 1411 et seq.], except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) Referral to and action by law enforcement and judicial authorities.

(A) Rule of construction. Nothing in this part [20 USCS §§ 1411 et seq.] shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) Transmittal of records. An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary

records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) Definitions. In this subsection:

(A) Controlled substance. The term "controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug. The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(C) Weapon. The term "weapon" has the meaning given the term "dangerous weapon" under section 930(g)(2) of title 18, United States Code.

(D) Serious bodily injury. The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(l) Rule of construction. Nothing in this title [20 USCS §§ 1400 et seq.] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [29 USCS §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part [20 USCS §§ 1411 et seq.], the procedures under subsections (f) and (g) shall be exhausted

to the same extent as would be required had the action been brought under this part [20 USCS §§ 1411 et seq.].

(m) Transfer of parental rights at age of majority.

(1) In general. A State that receives amounts from a grant under this part [20 USCS §§ 1411 et seq.] may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) –

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this part [20 USCS §§ 1411 et seq.] transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule. If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this part [20 USCS §§ 1411 et seq.].

(n) Electronic mail. A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

(o) Separate complaint. Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

HISTORY:

(April 13, 1970, P.L. 91-230, Title VI, Part B, § 615, as added Dec. 3, 2004, P.L. 108-446, Title I, § 101, 118 Stat. 2715.)

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34 C.F.R. § 300.7 (2005)

§ 300.7 Child with a disability.

* * *

(c) Definitions of disability terms. The terms used in this definition are defined as follows:

(1)(i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (b)(4) of this section.

(ii) A child who manifests the characteristics of "autism" after age 3 could be diagnosed as having "autism" if the criteria in paragraph (c)(1)(i) of this section are satisfied.

(2) Deaf-blindness means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(3) Deafness means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance.

(4) Emotional disturbance is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

(5) Hearing impairment means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness in this section.

(6) Mental retardation means significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and manifested during the developmental period, that adversely affects a child's educational performance.

(7) Multiple disabilities means concomitant impairments (such as mental retardation-blindness, mental retardation-orthopedic impairment, etc.), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blindness.

(8) Orthopedic impairment means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

(9) Other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that –

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and

(ii) Adversely affects a child's educational performance.

(10) Specific learning disability is defined as follows:

(i) General. The term means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think,

speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

(ii) Disorders not included. The term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(11) Speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance.

(12) Traumatic brain injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects a child's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas, such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not apply to brain injuries that are congenital or degenerative, or to brain injuries induced by birth trauma.

(13) Visual impairment including blindness means an impairment in vision that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.